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Supreme Court of the United States

October Term, 1957

No. 874*

EDWARD JOSEPH POGOR and MIGUEL QUINONES,

Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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* Number not yet assigned to appellants

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May It Please the Court:

Now comes the appellee in the above-entitled cause and moves the appeal be dismissed, and that *certiorari* be denied, or, in the alternative, that the final judgment complained of be affirmed.

Statement

This is an appeal from a final order of the New York Court of Appeals entered on July 3, 1957, unanimously affirming, without opinion [3 N. Y. (2d) 836, rearg. den. 3 N. Y. (2d) 941], an order of the Appellate Division of the Supreme Court, First Department, which affirmed, without

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* Number not yet assigned to appellants.

opinion [3 App. Div. (2d) 703], a judgment of the Court of Special Sessions of the City of New York, County of New York, rendered June 28, 1956, convicting both appellants of the crime of CONSPIRACY (Penal Law, §§580, subds. 1, 6; 814) and the appellant Pogor of the crime of SUPPRESSING EVIDENCE (Penal Law, §814), after a trial. On the conspiracy count, each appellant was sentenced to serve sixty days in the workhouse. On the substantive count for suppression of evidence, the appellant Pogor was sentenced to an additional 60 days in the workhouse, to be served concurrently with his sentence on the conspiracy count.

On October 17, 1957, the New York Court of Appeals amended the remittitur in the instant case to state that, upon the appeal in that court, certain federal constitutional questions were raised and "that there was no violation of any constitutional rights of said defendants" [3 N. Y. (2d) 929, 942; Jurisd. Statement, Appendix A, pp. 12-13]. The appellants' notice of appeal from the affirmance of their convictions in the Court of Appeals was filed in the Court of Special Sessions of the City of New York, County of New York, on January 22, 1958 (Jurisd. Statement, p. 2).

The Facts

In 1954, an information was filed in the Court of Special Sessions of New York City and County against one John T. Hunt, business agent for the National Maritime Union of America (hereafter referred to as the N. M. U. or the union), charging him with crimes of receiving bribes as a labor union representative. The specified bribes were allegedly received from men seeking union membership, and

were asserted to consist of payments made by these men to Hunt or an accomplice in return for Hunt's issuance and delivery to them of union working papers.

During the following year, 1955, while the Hunt information was pending, the instant appellants, Pogor and Quinones, union colleagues of Hunt, engaged in a campaign to sabotage the Hunt prosecution. To that end, they approached a seaman named Rosario, one of the men who had purchased union papers from Hunt, and who had confided this criminal transaction to the district attorney. By misrepresentation, deception and intimidation, they attempted —unsuccessfully, as it turned out—to induce Rosario to recant his incriminating statements and to visit Hunt's lawyer, who would advise him what to say.

In another instance, the appellant Pogor visited a seaman named Biester, who also had purchased union membership from Hunt and had apparently so testified before the grand jury. During his visit, Pogor discovered that Biester had a significant slip of paper bearing Hunt's signature or name, which slip the district attorney had long been anxious to obtain and which Biester intended to turn over to him. Pogor wheedled the slip away from Biester with assertions that it was of no importance, left with it, and, when later interrogated about it by the district attorney, claimed that he had lost it.

These activities in Hunt's behalf resulted in the present information against the appellants. In one count, they were charged with conspiracy to obstruct justice and to suppress evidence in violation of section 814 of the Penal

Law, a statute dealing with witness and evidence tampering; and, in a second count, with a substantive violation of that statute, based upon Pogor's acquisition and concealment of the aforementioned slip of paper.

Both appellants were convicted upon the conspiracy count. Upon the second or substantive count, Pogor was convicted and Quinones was acquitted. Both appellants are presently at liberty, on bail, pending the Court's ruling upon their present application.

New York Statute Involved

So far as here pertinent, New York Penal Law, Section 580, subdivision 6, provides as follows:

"Definition and punishment of conspiracy.

"If two or more persons conspire:

* * *

"6. To commit any act * * * for the perversion or obstruction of justice, or of the due administration of the laws,

"Each of them is guilty of a misdemeanor."

The Information

The information presently under attack accuses the appellants in the following language:

"Be It Remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this Information accuse the above-named defendants of the Crime of Conspiracy, committed as follows:

"The said defendants, between on or about January 10, 1955, and on or about November 30, 1955, in the County of New York, unlawfully did corruptly conspire together and with divers other persons to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws.

"And, the said defendants, together with divers other persons, in the County of New York and at divers other places in pursuance and furtherance of the said conspiracy and to effect the objects thereof, committed the following overt acts:

"The said defendants, on or about January 28, 1955, had a conversation with one Jose Rosario, on the Steamship United States.

"The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of Kings, took and received a certain writing and paper from one Frederick Biester.

"The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of New York, concealed the said writing and paper which he had taken and received from the said Frederick Biester.

"SECOND COUNT

"AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendants of the Crime of Suppressing Evidence, committed as follows:

"The said defendants, in and about the month of November, 1955, in the County of New York, unlawfully did maliciously practice deceit and fraud, with intent to prevent one Frederick Biester, who had in his possession certain writing and paper which might be evidence in a certain proceeding entitled The People of the State of New York against John T. Hunt, being cognizant of any fact material thereto from producing and disclosing the same.

FRANK S. HOGAN,
District Attorney"

Questions Presented

The issues raised by the appellants in their present application are:

1. Whether Penal Law Section 580, Subdivision 6, is void for vagueness in so far as it proscribes "Acts for the perversion and obstruction of justice and of the due administration of the laws" (Jurisd. Statement, pp. 10-11), and,

2. Whether the information upon which the appellants were charged lacked sufficient specificity to meet the requirements of federal constitutional due process (Jurisd. Statement, pp. 7-10).

POINT I

The appellant's time for taking an appeal and/or for petitioning for review on *certiorari* has expired.

The New York Court of Appeals entered judgment against the appellants on July 3, 1957 [3 N. Y. (2d) 836], and subsequently, on October 17, 1957, amended the remittitur herein to acknowledge the decision of certain federal constitutional questions [3 N. Y. (2d) 929, 941]. Since the appellants did not file a notice of appeal from this judgment with the court "possessed of the record" (The Court of Special Sessions of the City of New York, County of New York) until January 22, 1958 (Jurisd. Statement, p. 2), their present appeal to review is not in time (28 U. S. C., Rev. Rules, Supreme Court of the United States, Rule 11). Having also failed to file their jurisdictional statement, or any other papers which might be treated as a petition for a writ of *certiorari*, with the Clerk of this Court within ninety days after entry of judgment against them in the New York Court of Appeals, the appellants have exhausted the time within which such filing is permitted (*id.*, Rule 22).

POINT II

The statute is specific and definite.

The statute in question (Penal Law, §580, subd. 6) uses words of common, clear, and long-standing import to define the conduct penalized, and is not "clearly meaningless to the layman," as contended by the appellants (Jurisd. Statement, p. 11). So far as it relates to the instant case, the law provides simply and clearly that

> "If two or more persons conspire * * * to commit any act * * * for the perversion or obstruction of justice, or of the due administration of the laws,"

each of them is guilty of a misdemeanor.

The portion of the statute now under attack is no more than the conspiratorial analogue of substantive crimes concerned with witness tampering and suppression of evidence long forbidden by both the English common law and statutes of the State of New York. There is no doubt that both of these sources of law make punishable conduct such as that of the instant appellants who, in attempting to subvert a criminal prosecution pending against one of their union superiors, secreted evidence and intimidated witnesses. [I Burdick, *Law of Crime*, pp. 409 *et seq.*; 8 *Ruling Case Law*, pp. 319 *et seq.*; 67 *Corpus Juris Secundum*, pp. 45, 52-53, 57 *et seq.*; 39 *American Jurisprudence*, pp. 501-506; Wharton, *Criminal Law of the United States* (5th Ed. 1861), §2333; Russell, *Crimes and Misdemeanors* (8th Ed. 1923), pp. 508-509; Penal Law, §§580 (1, 6), 810-814.]

Accordingly, the evidence of clear common law and independent statutory referrents dispositive of the language now under attack is sufficient to sustain its constitutional validity [*Winters* v. *New York* (1947) 333 U. S. 507, 519; *Musser* v. *Utah* (1947) 333 U. S. 95, 97-98; *Champlin Rfg. Co.* v. *Corp. Comm. of Oklahoma* (1932) 286 U. S. 210, 242-243; *Connally* v. *General Construction Co.* (1926) 269 U. S. 385, 391; *People* v. *Grogan* (1932) 260 N. Y. 138, 145-146].

Of course, the primary purpose of the "void for vagueness" doctrine is, to warn individuals of the criminal con-

sequences of their conduct, but this Court has repeatedly ruled that "impossible standards of specificity are not required" [*Jordan* v. *De George* (1951) 341 U. S. 223, 230; *United States* v. *Petrillo* (1947) 332 U. S. 1, 7-8]. Traditionally, no more need be shown than that the statutory language employed conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices [*Connally* v. *General Construction Co.* (1926) 269 U. S. 385, 391]. Strained and technical constructions of a penal statute are to be avoided where their suggestion is manifestly to frustrate the clear purpose of the legislation [*Kordel* v. *United States* (1948) 335 U. S. 345, 348-349], and that the standard employed may be susceptible to doubts in "less obvious" cases does not, of itself, render the proscription unconstitutional for vagueness [*Jordan* v. *De George, supra,* 341 U. S. 223, 233; *Williams* v. *United States* (1951) 341 U. S. 97, 101; *United States* v. *Harris* (1954) 347 U. S. 612, 618; *United States* v. *Petrillo, supra,* 332 U. S. 1, 7; *United States* v. *Ragen* (1942) 314 U. S. 512, 523; *United States* v. *Wurzbach* (1930) 280 U. S. 396, 399; and see *Nash* v. *United States* (1913) 299 U. S. 373, 377].

Nor does anything said or decided in *Musser* v. *United States, supra,* 333 U. S. 95, upon which the appellants heavily rely (Jurisd. Statement, p. 11) effect these conclusions. In that case, the defendants had been convicted under a statute making it criminal to conspire "to commit any acts injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws • • •" (*id.*,

333 U. S., at p. 96). The only portion of this statutory language applied to them in the information was that concerning "public morals," and the offense charged related entirely to the defendants' activities in counselling, advising, and procuring polygamous marriages (*id.*, 333 U. S., at pp. 96-99).

On appeal, this Court deliberately avoided passing upon the constitutionality of the statute, and went no further than to announce that the legislation was "part of the whole body of common and statute law of [Utah] • • • to be judged in that context" (*id.*, at p. 97). Since the Supreme Court of Utah had not specifically set out the margins of the statute's operation or passed upon it from the standpoint of federal due process, the case was remanded to that bench for further consideration.

From this, it is quite apparent that the *Musser* case put into issue statutory language totally different from that involved here. The Utah statute had been applied to a so-called "public morals" situation in such a way as to make the advocacy of certain religious views a crime. Had the Utah statute as applied not been "entwined with limitations on free expression," it seems quite doubtful that any persuasive reason for questioning its clarity would have arisen [*Winters* v. *New York, supra*, 333 U. S. 507, 517, 519]. At all events, it is perfectly apparent that no such "free expression" issue as prevailed in *Musser* was raised, or is implicit, in the instant case. Here, the language to be construed concerns the "perversion or obstruction of justice or of the due administration of the laws" and relates simply to a situation involving

the suppression of evidence and intimidation of witnesses in a criminal case. Since there can be no doubt that the language at issue here has been applied from time immemorial to offences of the very sort charged, and that it does not aim at the creation of new crimes, the appellants' suggestion of vagueness is without foundation [*Beauharnais* v. *Illinois* (1952) 342 U. S. 250, 253; *Winters* v. *New York, supra*, 333 U. S. 507, 519; *Champlin Rfg. Co.* v. *Corp. Comm. of Oklahoma, supra*, 286 U. S. 210, 242-243; *Fox* v. *Washington* (1915) 236 U. S. 273, 277]. In these circumstances, it is apparent that the statutory provision here involved was more than sufficiently clear and did not constitute "a trap for those who act in good faith" [*United States* v. *Ragen* (1942) 314 U. S. 512, 524].

POINT III

The information was sufficient; the court's ruling on the demand for a bill of particulars was proper, and no element of federal due process was denied to the appellants.

A. *Concerning the information*

Under the first count of the information the appellants were charged with conspiring

> "to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and the due administration of the laws."

The information next proceeded to list three overt acts from which the existence and operation of the conspiracy

could be proved. The first alleged a conversation had by the appellants with Jose Rosario, on or about January 28, 1955, aboard the Steamship United States. The other two recounted Pogor's acquisition, retention, and concealment of a certain writing from the witness Biester, who had previously appeared before the grand jury in its investigation of John T. Hunt.

The second count charged the appellants with suppressing evidence by fraudulently inducing Biester to relinquish a certain paper material to the development of the People's case against John T. Hunt.

In short, it is clear from the first count that the defendants were charged with conspiracy to commit certain offenses dealing with interference with witnesses and suppression of documentary evidence—subjects covered by section 814 of the Penal Law; that one of these offenses concerned a discussion with Jose Rosario on a specified date on a specified steamship; and that another concerned the taking of a piece of paper by the defendant Pogor from Frederick Biester in a specified month. And the second count, elaborating upon the latter matter, explicitly advised the defendants that the substance of the "suppression" charge was the practice of deceit and fraud by Pogor to obtain this piece of paper, the significance of which was that it promised to play a role in a pending criminal prosecution against John T. Hunt.

The test of the sufficiency of an indictment, this Court has stated [*United States* v. *Debrow* (1953) 346 U. S. 374, 376],

"is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the records show with accuracy to what extent he may plead a former acquittal or conviction. *Cochran and Sayre* v. *United States*, 157 U. S. 286, 290; *Rosen* v. *United States*, 161 U. S. 29, 34."

The information at hand satisfied each of those requirements by describing the conspiracy in its ultimate effect, and by setting out the means by which the attempt to interfere with the Hunt prosecution had been effected. There is no possibility that the defendants may be subjected to another prosecution for the same offense. Under the first count, they were convicted of a continuing crime committed between January and November 1955, and the judgment fully protects them from a further charge based upon any acts comprising that crime which occurred between those dates. [See *People* v. *Farson* (1927) 244 N. Y. 413, 419; *Wilson* v. *Commonwealth* (1904) 119 Ky. 769, 82 S. W. 427, 428-429.] The judgment against Pogor under the second count of the information is equally conclusive.

Nor can there be any doubt that the information, in charging the offense, the general manner in which it was committed, and the dates between which it occurred, notified the defendants of the nature and character of the crime charged. Quite evidently, therefore, the appellants' contention—in substance, that it was necessary, in order

to enable them to prepare a defense, for the information to recite the numerous evidentiary details relied upon by the People—is baseless.

In these circumstances, it is similarly apparent that their request for a bill of particulars was properly rejected. As an examination of the demand for these particulars (Jurisd. Statement, pp. 5-6) must reveal, each of matters denied went to the very core of the evidence to be offered by the district attorney, and consequently, each was objectionable in the discretion of the court [*Mulloney* v. *United States* (1st Cir. 1935) 79 Fed. (2d) 566, 572; *People* v. *Jordan* (Gen. Sess. N. Y. Co. 1953) 128 N. Y. Supp. (2d) 457, 460; *People* v. *Rubin* (Gen. Sess. N. Y. Co. 1939) 170 Misc. 969, 970-971; *People* v. *Rogers* (Gen. Sess. N. Y. Co. 1934) 150 Misc. 753, 754; and see, *United States* v. *Lepowitch* (1943) 318 U. S. 702; Joyce, *On Indictments* (2d ed. 1924) §325, p. 363].

Finally, that the appellants—as a matter of fact—were in no way confused by the information, is apparent from the record insofar as it demonstrates that they made an acute effort to controvert every element of proof offered by the People and at no point during the trial urged that any testimony elicited by the prosecution had surprised them.

Conclusion

The appellants' contentions are insubstantial and their petition should therefore be dismissed, or in the alternative the judgment complained of should be affirmed.

Respectfully submitted,

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